88-1081

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

PERLIE DONALD WORKMAN
and JEFFREY WORKMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Court of Appeals ignore this Court's decisions in Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986), and Bruton v. United States, 391 U.S. 123 (1968), in making the erroneous finding that the introduction of the statement of a deceased government witness was not a violation of the Sixth Amendment right of the Defendant to confront and cross-examine witnesses against him?

II. Did the Court of Appeals ignore or misapply the standards as set forth by this Court in determining that the Davis statement was admissible under a firmly established exception, Federal Rule of Evidence 804(b)(5) and therefore did not violate either the Sixth Amendment or Bruton principle?

III. Did the Court of Appeals err in finding that sufficient evidence

existed to convict petitioner Perlie Donald Workman of intimidating and threatening a witness in violation of 18 U.S.C. Section 1512(b)(1)?

PARTIES

The parties to this proceeding are the petitioners (defendants below), Perlie Donald Workman and Jeffrey Workman, and respondent (plaintiff below) United States of America.

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No. 88

UNITED STATES SUPREME COURT

October Term 1988

PERLIE DONALD WORKMAN and JEFFREY WORKMAN, Petitioners,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners, Perlie Donald Workman and Jeffrey Workman, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceeding on October 26, 1988.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 860 F.2d 140 Fourth Circuit 1988, and appears at pp. A1-A28 in the separate Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1988. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

STATEMENT OF THE CASE

On October 26, 1988, the United States Court of Appeals for the Fourth Circuit entered a published opinion as shown in a separate appendix pp. A1-A28 affirming the District Court judgment entered on August 5, 1987. The petitioner, Perlie D. Workman, was convicted of possession of goods and chattels, which were stolen and which had been part of an interstate shipment in violation of 18 U.S.C. Section 659. Petitioner, Jeffrey Workman, was convicted of aiding and abetting in said possession in violation of 18 U.S.C.

Section 659 and 2. Perlie Workman was also convicted of intimidating and threatening a witness in violation of 18 U.S.C. Section 1512(b)(1). Both petitioners challenged their convictions and argued that the introduction into evidence of the previously recorded statement of Terry Davis, who was deceased at the time of the trial, over their objection, violated their Sixth Amendment right to confrontation of this witness and also violated the Federal Rules of Evidence. It was argued that without the Davis statement, which had been given to FBI Agent, John Turner, and recorded by Davis' attorney Joe Byrd, the evidence supporting the possession count and the aiding and abetting counts would not have been sufficient to convict. At the trial, evidence as adduced, tended to show that Joe K. Byrd, Jr., an attorney

in Morganton, North Carolina, had been employed to represent Terry Davis, an indicted co-defendant of the petitioners, who when first interviewed by Byrd, never mentioned Jeffrey Workman or Perlie Workman as having been involved in the alleged actions for which the petitioners were tried and that only after Davis was made an offer by the United States Attorney and the government, in the form of a plea arrangement, did he make any statements implicating the petitioners.

After the plea arrangement was entered into with the government, Davis, in the presence of Byrd and FBI Agent Turner, made a recorded statement in which he implicated the petitioners as having been involved in the possession and purchase of the merchandise in question, said interview having been conducted on May 12, 1987.

The co-defendant, Davis, later died and the tape recording was introduced into evidence by the government over the objection of the petitioners' attorney.

The government, at the time of the trial of this matter, called Ronald Wayne Wilson, an additional co-defendant, as a witness to testify concerning the events and his involvement in the theft of the liquor. During the testimony in District Court, he advised that he at no time saw anyone unloading the truck which contained the liquor and further advised that he did not know the petitioner, Perlie Workman, personally but did know where he lived and that he saw the truck parked across the road from the Workman house, however, he did not know where the Workman business was located. Wilson further testified that he knew an individual named William Keith Hughes,

who went by the name of Keith, whom he had met while in prison and that during the time prior to the trial, he talked with William Keith Hughes about the matters involving this case and wrote a letter to William Keith Hughes after he (Wilson) was release from prison and while Hughes was still incarcerated in the Rutherford County jail. The letter, introduced in the trial of this matter in the District Court, which is reproduced in the separate appendix pp. A28, indicated to Hughes that as far as Wilson knew, the petitioners had nothing to do with the shipment of liquor at any time. The letter clearly indicated that the implication by the government's witness, Davis, was contrived to obtain concessions or sentence reduction from the government. The co-defendant, Wilson, further testified that while he

was in the Rutherford County jail, the deceased co-defendant, Terry Zaine Davis, came to see him on several occasions and attempted to get him to testify against the petitioners.

The government also called James Edward Norman as a witness and during the Norman testimony, Mr. Norman advised that he was from Blacksburg, South Carolina, and that he knew the petitioners as legitimate businessmen, having done business with them in the textile trade for a number of years. He further testified that he had made calls, both before and after July of 1986, to petitioner Perlie Workman but that this was not involved in any way with the alleged theft of the liquor.

Norman advised that a boy had called him and wanted to sell some gin and that when he first called, Norman had refused,

saying he was not interested, however, sometime later in the day he decided to purchase the liquor since he had a "gasohol" license. He testified that he purchased the 450 cases of gin, most of which was in half-gallon jars, packed six to the case, and advised that he at no time made any purchase, nor to his knowledge was the petitioner, Perlie Workman, involved in any way. Norman further testified that he had entered a plea of no contest in South Carolina, through his attorney, to the charge of receiving stolen goods into interstate commerce in United States District Court, Greenville District, Greenville, South Carolina, and thereafter was sentenced, with his sentence presently being appealed. He further testified that he had a legitimate relationship with the petitioners in which he purchased socks

or textile goods. He testified that he had never been involved with the petitioners in the purchase of the alcohol in question, that he had spoken with Special Agent Turner, who had asked him to testify against the petitioner, Perlie Workman, and in return, Special Agent Turner had promised to give him probation in his case at which time Norman asked Agent Turner if he was asking him to tell a lie to help himself, that he had previously told the officers that petitioner, Perlie Workman, was not involved in the purchase or sale of alcohol and that it was the truth then and was the truth at the time of his testimony in Court. Further he testified that he was not trying to protect the petitioners but was telling the truth and that the person he actually purchased the liquor from used the nickname "Black Cat"

and that there was no doubt in his mind that the person he purchased the gin from was not the petitioners, and that he had told the FBI agent that it was not the petitioner, Perlie Workman.

The defendants called at the trial of this matter as a witness, William Keith Hughes, who had previously been identified by the government witness, Ronald Wayne Wilson, as the individual whom he had met in prison and to whom he had sent the letter, marked as a Defendant's Exhibit, and shown in the separate appendix, pp. A28. Hughes testified that he had been incarcerated in the Rutherford County jail, and while there, came to know Wilson, and remained in jail as a Federal prisoner after Wilson was released, that he received the letter in question from Wilson, which is the same letter marked as

Defendant's/Petitioner's Exhibit 1, which he received in the mail and had furnished the original of said letter to the petitioners' attorney after he had received the same from Wilson. In the letter, which was read to the jury, Wilson advised that Terry Davis was pleading not guilty in return for a plea bargain and that Davis had come to Rutherfordton several times to try to get Wilson to say that he knew Workman and bought "the stuff", referring to the stolen liquor. He further advised in the letter that he was not going to lie to help Terry, that the person who had purchased the liquor was a man from South Carolina, and that Terry had sold the load to him, that he had been indicted and was in Court also. He further testified that Terry was trying to put the blame on petitioner, Perlie Workman,

that he signed the letter "Ron" and addressed the letter to "Keith" and that the letter was dated June 18th. He further advised that he had been told by Wilson that Wilson did not know Perlie Workman, that he had been pressured into saying that he did so that he could make bond with a promise of probation by the FBI. The petitioners argued at the trial, that the statements of the co-defendants, as well as other government witnesses and the exhibits offered by the Defendants in the form of the letter, clearly demonstrated that the statement introduced by the government did not have sufficient guarantees of reliability, and in fact, through the evidence adduced at trial, was shown to be patently unreliable and likely the product of the deceased witness made in a desire to curry favor from the government or obtain

plea concessions.

The evidence was further adduced at the trial indicating that the deceased witness, Davis, was known by the nickname, "Black Cat", which, the petitioners' attorneys argued to the Trial Court, corresponded with the information given by James Edward Norman and Ronald Wayne Wilson and raised serious questions as to the reliability or truthfulness of the statement of Davis.

On appeal to the Fourth Circuit Court of Appeals, the petitioners argued that the inclusion of the testimony of Davis, over the objections of the petitioners at trial, violated their Sixth Amendment right to confront and cross-examine the witnesses against them.

Circuit Judge Chapman, in writing the opinion for the Court, rejected the

arguments of the petitioners, finding, it is argued erroneously, that the admission of the statement did not violate this Court's criteria for admission of such evidence as set forth in Bruton v. United States, 391 U.S. 123 (1968).

The government claimed and the Court of Appeals determined that Davis' statement was admissible under the hearsay exception as set forth in Federal Rule of Evidence 804(b)(5), and therefore it did not violate either the Sixth Amendment or Bruton principle. The Court erroneously concluded, it is respectfully argued, that they were not faced with a Bruton issue, but rather with a hearsay question.

It is contended that the Court of Appeals completely ignored this Court's directives as set forth in Lee v. Illinois, 106 S. Ct. 2056 (1986), and in

so doing, entered an opinion in direct contradiction of the position taken by this Honorable Court in Bruton and Lee.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW APPARENTLY IGNORED THIS COURT'S DECISIONS IN LEE V. ILLINOIS, S. CT. 2056 (1986) AND BRUTON V. UNITED STATES, 391 U.S. 123 (1968), IN MAKING THE ERRONEOUS FINDINGS SUPPORTING THE INTRODUCTION OF THE STATEMENT OF A DECEASED GOVERNMENT WITNESS AND FINDING THAT THE SAME WAS NOT A VIOLATION OF THE SIXTH AMENDMENT RIGHT OF THE DEFENDANT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM.

The district court, over the objection of the petitioners' counsel, admitted into evidence incriminating statements by Terry Zaine Davis, a deceased co-defendant, and in so doing, it is argued, committed clear error.

The petitioners' appealed to the Fourth Circuit Court of Appeals and there Judge Chapman, speaking for the Court, determined that the Davis statement was admissible under a firmly established

hearsay exception, Federal Rules of Evidence 804(b)(5)[1] and therefore did not violate either the Sixth Amendment or the Bruton principle. It is well established that "the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal", Pointer v. Texas, 380 U.S. 400 Section 405 (1965), as recently noted by this Honorable Court in Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986). The Sixth Amendment serves both symbolic and functional goals. On the one hand, the right to confront and cross-examine witnesses contributes to the establishment of the system of justice in which the perception, as well as the reality of fairness, prevails by insuring that convictions will not be based on the charges of unchallenged

witnesses. On the other hand, the Sixth Amendment serves the practical goal of promoting reliability in criminal trials. In California v. Green, 399 U.S. 149, 158 (1970), the court emphasized the manner in which confrontational cross-examination advanced the pursuit of truth in criminal trials:

> Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

(Footnote omitted.)

The courts have long recognized that the truth-finding function of the Sixth Amendment is particularly threatened when

an alleged accomplice's statement is sought to be introduced against a criminal defendant without the benefits of cross-examination. Lee v. Illinois, supra, 106 S. Ct. at 2062; Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965). As this Court stated in Lee v. Illinois, supra, 106 S. Ct. at 2062, such a statement

> "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally....More than this, however, the post-arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."

(Quoting Bruton v. United States, supra, 391 U.S. at 141 (White, J., dissenting)).

Because of the strong presumption of

unreliability attached to statements of an accomplice which inculpate the defendant, this Court has held repeatedly that when the statement of a non-testifying accomplice is introduced at trial and the defendant cannot cross-examine the accomplice, the introduction of the statement violates the Sixth Amendment. Douglas v. Alabama, supra; Bruton v. United States, supra, Lee v. Illinois, supra; Cruz v. New York, 107 S. Ct. 1714 (1987). In Bruton, this Court held that a confession which incriminates an accomplice is so "inevitably suspect" and "devastating" that even explicit instructions from the judge limiting the use of the confession as evidence solely against the co-defendant were insufficient to protect the Sixth Amendment rights of the Defendant. 391 U.S. at 136. The Bruton rule remains

viable today.

The facts of this case put it squarely within the holding of Bruton and its progeny. The alleged accomplice of the defendant did not testify at trial because of his death. The prosecution introduced a statement inculpating the defendant which was made to police by the alleged accomplice after his arrest. Under the established ruling in Bruton, this statement was inherently suspect and unreliable hearsay, and on this basis alone its admission against the defendant was error. Moreover, the alleged accomplice's statement was factually undermined by other evidence in the case, including a letter from a co-defendant indicating that the alleged accomplice had fabricated the part of his story relating to the defendant's involvement in the criminal activity. The lack of

credibility and unreliability of the alleged accomplice's out-of-court statement is further demonstrated by the fact that the statement was given only after he had been promised a cap on his sentence in exchange for fingering others. In such a situation, the alleged accomplice had no reason or motivation to speak accurately about the defendant. Thus, the admission of the statement was clearly prejudicial to the defendant as a violation of his Sixth Amendment right to confront and cross-examine witnesses. In light of the lack of evidence against the defendant aside from the alleged accomplice's statement, this court must reverse the defendant's conviction. See Close v. United States, 450 F.2d 152 (4th Cir. 1971), cert. denied, 404 U.S. 1068 (1972) (where circumstantial evidence gave basis for charge of interstate

transportation of stolen property when coupled with evidence as to confessions of defendant's co-defendant, and there was no direct evidence of defendant's involvement except for those confessions, admission of evidence of oral confessions of nontestifying co-defendants was reversible error).

The Court of Appeals, it is contended, improperly relied upon Bourjaily v. United States, 107 S.Ct. 2775 (1987).

It is plain, however, that Bourjaily in no way affects the outcome of this case, for it has no relevance to situations in which a post-arrest confession of a co-defendant or accomplice is admitted against a defendant.

First, this Court's holding in Cruz v. New York, supra, in the same term and

two months prior to Bourjaily is conclusive evidence that the Court had no intention of affecting the line of cases under Bruton in Bourjaily. In fact, in Cruz the entire Court adhered to the basic rationale and holding in Bruton, for even the dissenters recognized the vitality of Bruton and indicated a preference for the views in Parker v. Randolph, supra, which itself followed Bruton. It is simply impossible to view Bourjaily as an indication that the Court has abandoned the rule that an accomplice's out-of-court statement which inculpates a defendant is so unreliable, suspect, and devastating as to be inadmissible against the defendant.

Second, the theoretical underpinnings of the Bourjaily decision are entirely separate from those of the Bruton line of cases. In Bourjaily, the

Court rested its holding on the fact that because co-conspirators' statements made in furtherance of a conspiracy have long been recognized as being reliable, no independent inquiry into reliability is necessary. It expressly contrasted the situation in Dutton v. Evans, 400 U.S. 74 (1970), in which the Court held that a reliability inquiry was required in situations were co-conspirators' statements were made after the termination of the conspiracy. 107 S. Ct. at 2783. Obviously, in light of the long line of decisions from the Court recognizing the unreliability of an accomplice's statement inculpating a defendant, the Court's analysis in Bourjaily could not possibly be applicable to the present case.

In addition to the constitutional error committed by the trial court, it

also erred by admitting the confession of the accomplice in violation of Fed R. Evid., 804 (b)(3). Rule 804 (b)(3) permits, as one exception to the hearsay exclusion, the introduction of "[a] statement which . . . so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." In other words, an out-of-court statement is considered sufficiently reliable for purposes of the Rules of Evidence if the statement was made against the penal interest of the declarant.

In interpreting this provision, courts have clearly indicated that a factual inquiry into the circumstances of the statement must be made in order to determine if, at the time of the

statement, the declarant was truly action against penal interest. See, e.g., United States v. Oliver, 626 F.2d 254 (2d Cir. 1980); Rado v. State of Connecticut, 607 F.2d 572 (2d Cir. 1979), cert. denied, 447 U.S. 920 (1980); United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). Thus, if while inculpating himself to some degree the defendant also was making a statement to improve his position with regard to possible prosecution against him, his statements are not necessarily against penal interest. Id. As stated in the Advisory Committee Note to Fed. R. Evid. 804, "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as

against interest."

Under this rule, it has therefore been held that a statement made after the prosecution had offered an accomplice a plea bargain, involving dismissal of one of several counts, was not made against penal interest. United States v. Bailey, supra; see also United States v. Gonzalez, supra (statement by accomplice who had been immunized was not statement against penal interest); Hendrix v. Smith, 639 F.2d 113 (2d Cir. 1981) (statement of unindicted co-conspirator not against penal interest). Even where no explicit inducements or promises were made, inculpatory statements given by a person in custody which implicate others may not be against penal interest within Rule 804 (b)(3). As noted in United States v. Oliver, supra, a person's statement may be motivated in part by the

prospect of severe punishment for his crime if he did not cooperate and the desire to gain favor with the government in the hope of obtaining release or reduced punishment. Under such circumstances it could not be said with certainty that a reasonable man would not make a statement unless he believed it to be true.

In short, because of the circumstances, the alleged accomplice's out-of-court statement implicating the defendant was untrustworthy and unreliable. It thus failed to meet the constitutional requirement for admissibility under the Sixth Amendment, and should have been excluded on that basis. As stated by the Supreme Court in Ohio v. Roberts, 448 U.S. 56, 66 (1980), where reliability cannot be inferred the evidence must be excluded "absent a

showing of particularized guarantees of trustworthiness." Such guarantees cannot be made in this case, for the statement could not even satisfy the requirement of Fed. R. Evid. 804 (b)(3) that a statement against penal interest be shown. Thus, there was no basis to support the admission of the evidence.

II. THE COURT OF APPEALS MADE ERRONEOUS FINDINGS IN DETERMINING THAT THE EVIDENCE OFFERED BY THE GOVERNMENT WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS OF THE PETITIONERS.

The evidence offered by the Government was insufficient to sustain the convictions of the Petitioners.

With regard to the charges against Jeffrey Workman as contained in SH-CR-87-57 and the charges contained in SH-CR-87-7 against Perlie Workman, the introduction of the testimony of the deceased co-defendant constituted the only direct evidence in which the

Petitioners were named as participants or conspirators in the alleged crimes and therefore, due to the inadmissibility of the evidence, the Government had insufficient evidence to sustain the convictions as to said counts of the Indictments. It is respectfully argued that by reason of the lack of sufficient evidence to support a conviction, the motions made by Defendants' counsel for judgment of acquittal should have been allowed as to those counts.

With regard to the charge of intimidating or threatening a witness as contained in Count 2 of the Indictment contained in docket number SH-CR-878-69, the evidence was insufficient to convict the Defendant under 18 U.S.C. 1512 (a)(1). The ambiguous nature of the statements made by the Defendant and Davis in their conversation, which forms

the basis of the Defendants' convictions, where intimidating a witness makes it impossible as a matter of law to conclude that the Defendant, in fact, had the intent to intimidate or threaten the deceased co-defendant. The cases which interpret Title 18 United States Code, Section 1512 (a)(1) set forth, and before a defendant may convicted under that Statute, the statement in question must truly be determined to be threats as noted by the Court in U.S. vs. Wilson, 565 F.supp 1416, 1431 (SD.NY 1983), to support a conviction under Section 1512, a statement must

> "be construed as being sufficiently clear as to convey a gravity of purpose and imminent prospect of execution"

[Quoting U.S. v. Kehner, 534 F.2d 1020, 1027 (2nd Cir.), cert. denied, 419 U.S. 1022 (1976)]

Thus, the Courts have held that a

non-threatening attempt to have a witness give false information is not witness tampering as defined pursuant to Section 1512 (a)(1). In Kehner the Court held that although the facts demonstrated conclusively that the Defendant tried to persuade a witness to lie to mislead the Government, the facts failed to show any intimidation of the witness and accordingly, the Court reversed the Defendant's conviction.

Similarly, in the present case, the ambiguous facts make it unclear whether the Petitioner was threatening Davis, merely trying to persuade him, or even whether any attempt was being made to obstruct justice. To convict on these facts, the jury must have relied more upon speculation than on the evidence, which mandates reversal in the Petitioner's conviction. A conviction

based on evidence that requires speculation or mere conjecture by the jury is invalid. U.S. vs. Brown, 763 F.2d 987 (8th Cir. 1985), cert. denied, 106 Sup. Ct. 273 (1986); U.S. vs. Carter, 522 F.2d 606 (D.C. Cir. 1975) (A conviction cannot stand unless each element of the offense is supported by sufficient evidence and speculation may not serve as an inadequate factual predicate).

Additionally with regard to the alleged violation by Perlie Donald Workman of Section 1512 (a)(1), the actions on the part of Davis and Special Agent Turner were very analogous to the factual setting set forth in Messiah v. United States, 377 U.S. 201 (1964). In the instant case as in Messiah the Defendant was free on bond and had a conversation in the absence of his

counsel with one of his co-defendants, which was overheard by the agent involved via a radio transmitter; the conversations amounting to incriminating statements on the part of the Defendant. It is obvious from the evidence in the present case that the only evidence against the Petitioner concerning the violations alleged are from the statements made to the now deceased co-defendant. It is respectfully argued that under the situation as it appears in the present case, the obtaining of the statements violated the Fourth, Fifth, and Sixth Amendments of the Petitioner, and further violated the standards as set forth in Messiah.

In the instant case it is respectfully argued that the Defendant's own incriminating statements, obtained by a Federal Agent through a co-defendant

may not be constitutionally used by the prosecution as evidence against the Defendant at his trial.

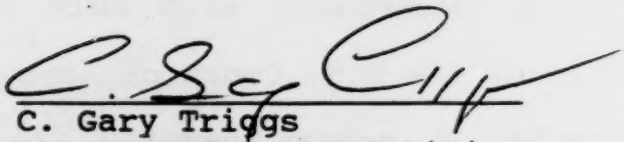
It is further respectfully argued that the unavailability of Davis to testify concerning the sequence the events surrounding the meeting with the Petitioner or allow cross-examination to determine the impressions, feelings, or mental state of the deceased witness to determine whether or not a violation of 18 U.S.C. Section 1512(b)(1) had taken place clearly violated the Sixth Amendment rights of the Petitioner.

CONCLUSION

The Petitioners, for the reasons as set forth hereinabove, respectfully pray this Court to grant this petition for a writ of certiorari for determination by this Court of the issues as set forth herein. The Petitioners respectfully

argue that unless the petition is granted, the petitioners have no other course of redress for the protection of their constitutional rights. It is further respectfully argued that the Court of Appeals obviously ignored this Court's decisions in Lee v. Illinois, 106 S. Ct. 2056 (1986) and Bruton v. United States, 391 U.S. 123, (1968), in making the erroneous findings in which they determine that the introduction of the statement of deceased witness was not a violation of the Sixth Amendment rights of the petitioners to confront and cross-examine a witness, but rather was an admissible statement under a firmly established hearsay exception. For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the U.S. Court of Appeals Fourth Circuit, I hereby certify that I have this 27th day of December, 1988, filed the required copies of the Petition for Writ of Certiorari in the Clerk's Office, and have mailed the required copies of the Petitioners' Writ to:

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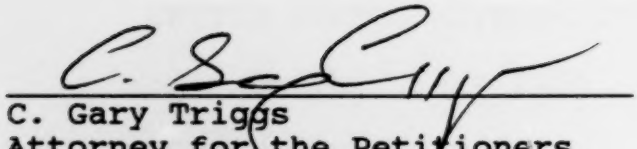

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NO. 88-

UNITED STATES SUPREME COURT

October Term 1988

PERLIE DONALD WORKMAN and JEFFREY WORKMAN, Petitioners,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Woodrow Wilson Jones, District Judge. (CR-87-7).

Argued: May 6, 1988
Decided: October 26, 1988

Before CHAPMAN and WILKINSON, Circuit Judges, and GORDON, Senior District Judge for the Middle District of North Carolina, sitting by designation.

C. Gary Triggs (C. GARY TRIGGS, P.A. on brief) for Appellants. Thomas E. Booth (DEPARTMENT OF JUSTICE; Thomas J. Ashcraft, United States Attorney; Jerry Miller, Assistant U. S. Attorney on brief) for Appellee.

CHAPMAN, Circuit Judge:

Perlie D. Workman was convicted of possession of goods and chattels which were stolen and which had been part of an interstate shipment in violation of 18 U.S.C. 659. Jeffrey Workman was convicted of aiding and abetting in said possession in violation of 18 U.S.C. 659 and 2. Perlie D. Workman was also convicted of intimidating and threatening a witness in violation of 18 U.S.C. 1512(b)(1). Both appellants challenge their convictions claiming that the introduction into evidence of the previously recorded statement of Terry Davis violated their Sixth Amendment right to confrontation of this witness, and also violated the Federal Rules of Evidence. Without the Davis statement, which had been voluntarily given to FBI Agent John Turner and recorded by Davis'

attorney Joe Byrd, the evidence supporting the possession count and the aiding and abetting count would not be sufficient to convict. However, the exclusions of this evidence would not alter the sufficiency of the evidence on the intimidating and threatening a witness count.

After a complete review of the evidence and the law, we agree with the trial judge that the out-of-court statement of Terry Davis was admissible, because it fell within a firmly rooted hearsay exception, and we affirm.

I

In July 1986, Ronald Wilson, a professional truck driver, received a shipment of 1,068 cases of liquor for delivery to a company in Texas. At the time, Wilson was in debt, and he decided to steal the shipment and sell it for

cash. Wilson, who was in Kentucky, called his cousin, Terry Davis, in North Carolina and told him about the load and asked Davis to find a buyer for the liquor. Telephone records introduced into evidence showed that between 8:00 p.m. on July 25, 1986, the date of Wilson's first call to Davis, and 6:30 p.m. on July 26, 1986, six telephone calls were placed from the Davis residence to the appellants' residence.

Wilson drove to Knoxville, Tennessee, and again called Davis, who advised him to bring the load to a Rama Inn in Icard, North Carolina. After checking into the motel, Wilson accompanied Davis to the appellants' home, and Davis advised Jeffrey Workman that they had a shipment of liquor for sale. Jeffrey stated that he would contact them after Perlie Workman

returned home. Davis and Wilson drove to a convenience store and unsuccessfully attempted to sell the load. Davis returned to the Workman residence and offered to sell the load to Perlie Workman, who responded that he did not want the liquor but he would contact someone who might be interested. Telephone records introduced into evidence showed that on July 26 and 27 three telephone calls were placed from the Workman residence to numbers listed to James Norman in South Carolina. Two months later, 422 cases of the stolen liquor were found on Norman's South Carolina farm.

Later on July 26, Jeffrey Workman advised Davis that Jeffrey and Perlie Workman would buy the liquor for $7,000 and instructed Davis to deliver but not to bring Wilson at the time of delivery.

Davis then drove to the Rama Inn and advised Wilson of the offer, and Wilson directed Davis to telephone Perlie Workman and confirm the price. This was done, and that evening Davis drove the truckload of liquor to Workman's home and was paid $7,000 by Perlie Workman. Jeffrey and Perlie Workman, together with Davis and two others, unloaded the liquor from the truck and placed it in a nearby building. Davis then met Wilson at the convenience store and delivered the $7,000 to him. Wilson paid Davis $500 for arranging the sale.

In January 1987, a grand jury returned a three count indictment against Perlie Workman, Terry Davis and Ronald Wilson for the theft and sale of the interstate shipment of liquor. In April 1987, Perlie Workman gave $3,000 in cash to Terry Davis' father and requested that

he give the money to Terry. he gave no explanation for his delivery of the money, and France Davis, Terry's father, assumed that the money was to pay for a trailer that Terry had been trying to sell to Perlie Workman. When France delivered the money to his son, he was informed that the trailer had already been sold. France Davis held the money until several days later when Perlie Workman came to the Davis residence and stated to France that he wanted to talk to Terry even though he knew that he should not be talking to him. At that time, France Davis returned the $3,000 to Perlie Workman.

After his indictment in January 1987, Terry Davis retained Attorney Joe Byrd to represent him on the criminal indictment that had been returned by the grand jury. In April 1987, Davis agreed

to plead guilty to one count of the indictment and cooperate with the government in the trial against the other defendants.

On May 12, 1987, Terry Davis, his attorney, Joe Byrd, and FBI Agent Turner met, and Davis gave a statement in which he confessed his role in the sale of the stolen liquor. He explained that Wilson had called and advised him that he wanted to sell the load of stolen liquor, and Davis explained the actions taken by Perlie Workman, Jeffrey Workman, Ronald Wilson, and himself in the sale and delivery of the stolen goods. Agent Turner had previously interviewed Ronald Wilson, who had confessed to stealing the load and calling Davis to assist him in selling it.

Attorney Byrd had a tape recorder at the meeting with Agent Turner, and the

questions of the agent and the answers of Davis were duly recorded on tape. This tape was kept by the attorney until shortly before the trial of the appellants, and it was then turned over to Agent Turner. This taped statement was introduced into evidence at the trial. The tape was identified by both Attorney Byrd and Agent Turner, who both testified to the circumstances surrounding the taking and recording of the statement.

On June 10, Perlie Workman asked Davis to meet him at the convenience store. Davis contacted Agent Turner, and Turner fitted him with equipment that would record his conversation with Perlie Workman and would also transmit the conversation to Agent Turner's automobile, which would be parked nearby. At this meeting in Workman's automobile,

Davis advised Perlie that Jeffrey Workman would probably be indicted, and that he (Davis) would have to tell the truth. Davis stated that he was scared, and the following conversation ensued:

> Perlie: "scared, hell, scared of what? You're in fact...you know what you are going to get? I'm gonna show you what you gonna get."
>
> Davis: (shouts) "no you don't Perl."
>
> Davis: (as he exited from Perlie's car): "Oh Lord! (pause) I've got to leave here."
>
> Perlie: "Terry, you better get here."

As Davis got out of Perlie Workman's car and fled the scene, FBI Agent Turner, who had been watching and listening to the meeting, arrested Perlie Workman, who was thereafter indicted for attempting to bribe Davis and for threatening Davis.

Two weeks prior to the trial, Terry Davis died of hepatitis, and shortly

thereafter the United States Attorney filed notice, pursuant to Federal Rules of Evidence 803(24), 804(b)(5), 803(5) and 804(b)(3), of his intention to use the recorded statements of Terry Davis as evidence at the trial. The statements were admitted into evidence, and Perlie Workman was convicted of possession of goods and chattels which had been stolen from an interstate shipment. Jeffrey Workman was convicted of aiding and abetting in this offense. Perlie Workman was acquitted on the bribery count, and he was convicted of intimidating and threatening a witness, Terry Davis.

II

Appellants claim that the admission of the tape of Terry Davis' statement to Agent Joe Turner violated their Sixth Amendment right to be confronted by the witnesses against them, and that they

were denied the right of cross-examination, and that the use of such statement violated Bruton v. United States, 391 U.S. 123 (1968). The government claims that the Davis statement was admissible under a firmly established hearsay exception, Federal Rule of Evidence 804(b)(5)[1], and therefore it did not violate either the Sixth Amendment or Bruton principle.

Bruton prevents the introduction of a co-defendant's confession, which

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[1] Federal Rule of Evidence 804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts: and (C) the general purposes of these rules and the

incriminates the defendant, at a joint trial when the co-defendant does not take the witness stand so that he may be cross-examined. This was a logical step following Pointer v. Texas, 380 U.S. 400 (1965), which held that the Sixth Amendment right of a criminal defendant to be confronted by the witnesses against him included the right to cross-examine the witnesses.

We are not faced with a Bruton issue. This case presents a hearsay question. Davis died before trial, and at the time of trial, he was not a co-

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[1] (Cont.) interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and the address of the declarant.

defendant of Perlie and Jeffrey Workman. The Court made clear in Bruton that a Sixth Amendment problem was created by the fact that, while the hearsay statement was inadmissible as to Bruton, it was admissible against his co-defendant, the declarant, who confessed his involvement and Bruton's involvement in the crime. The Bruton Court noted:

> There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is

concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.

391 U.S. at 128, n. 3.

When Ohio v. Roberts, 448 U.S. 56 (1979), was decided, the Court conditioned the use of out-of-court statements upon a showing of the unavailability of the declarant and the

adequate "indicia of reliability" of the statement, and concluded:

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

Id. at 66.

Recently, in Bourjaily v. United States, 55 U.S.L.W. 4962 (1987), the Court held that since the hearsay rules and the Confrontation Clause are designed to protect similar values, there is no need for an independent inquiry into reliability, if the evidence falls into a firmly rooted hearsay exception. However, this involved Evidence Rule 801(d)(2)(E), which covers the statement made by a co-conspirator of a party during the course and in furtherance of the conspiracy. We are faced with Evidence Rule 804(b)(5) which requires that there be "equivalent circumstantial

guarantees of trustworthiness," but this is just another way of expressing the need for "adequate indicia of reliability" or "independent inquiry into reliability."

The finding of the trial judge on the guarantees of trustworthiness are subject to the clearly erroneous standard of review, United States v. Smith, 792 F.2d 441, 443-444 (4th Cir. 1986), cert. denied, 107 S. Ct. 892 (1987), and this finding by the trial judge is not clearly erroneous. The statement was given voluntarily by Terry Davis to FBI Agent Turner. Attorney Joe Byrd represented Davis, and he was present during the entire time of the questioning of Davis by the agent. The tape recording was made by Attorney Byrd, at his insistence, and it was kept by him until Davis became critically ill.

There is no question as to the identity of the voices on the tape. They are the voices of the deceased Terry Davis and Agent Turner. The questions and answers, as read to the jury, were reacted to remove those to which objections had been made and sustained. Both Agent Turner and Attorney Byrd testified to the circumstances surrounding the giving and recording of the statement.

The actions of Davis, after making the statement, are circumstances that tend to guarantee its trustworthiness. His agreement to meet with Perlie Workman and to wear a tape recorder to the meeting tend to guarantee trustworthiness, because it demonstrated his conviction that his statement was true, and that a recorded meeting with Perlie Workman would support, and not

contradict, his statement.

In United States v. West, 574 F.2d 1131 (4th Cir. 1978), we held that under Federal Rule of Evidence 804 (b)(5) it was not necessary to determine if the circumstantial guarantees of trustworthiness are equivalent to those safeguards which arise from direct and cross-examination, and that the requirement of equivalent guarantees of trustworthiness was met "if there is equivalency of any one of the preceding 804(b) exceptions." Id. at 1136. The statement of Davis to FBI Agent Turner qualifies as a statement against interest under Rule 804(b)(3). This Rule provides:

> (3) Statement against interest. A statement which was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to

> render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is not subject to the second sentence of the rule.

In West we also held that the cooperation of a witness with the police to the extent of meeting with suspects and allowing the meeting to be observed and the conversation recorded lends a high degree of trustworthiness to the statement. We observed:

> Moreover, the jury listened to

> the tapes as well as the written statements, and the agents at the trial were subject to cross-examination about their testimony concerning what they did and what they observed. All of this lends a high degree of reliability and trustworthiness to Brown's testimony before the grand jury. It furnished the jury a firm basis for judging the truthfulness of what Brown said before the grand jury.
>
> It should not be surprising that the same circumstances suffice to meet the requirements of 804(b)(5) and of the Confrontation Clause. This is true of other exceptions to the hearsay rule which do not contravene the Confrontation Clause. The dying declaration and the declaration against penal interest have indicia reliability which warrant their admission as exceptions to the hearsay rule while at the same time warranting the admission under the Confrontation Clause.

574 F.2d at 1138.

The Davis statement also met the other mandates of Rule 805(b)(5) which require the trial court to determine that (A) the statement is offered as evidence

of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rule and the interests of justice will best be served by admission of the statement into evidence. Fed R. Evid. 804(b)(5).

The Davis statement was offered as evidence of a material fact. The statement was of a participant in the bringing together of Ronald Wilson, who wished to sell a truckload of stolen liquor, and the appellants, who agreed to and did buy it. Davis was the only eyewitness who could explain the entire transaction from its beginning (when he received the first telephone call from Wilson) until its end (when he picked up the $7,000 from Perlie Workman and

delivered it to Wilson). The statement was offered as evidence of material facts, because it tended to prove certain essential elements of the crimes charged.

The statement was more probative on the point for which it was offered than any other evidence which the government could procure through reasonable efforts. Actually, it was the only evidence that could be procured to prove the extent of the appellants' involvement in the crime. Davis was the only person who could tell the entire story and connect all of the parties. Wilson testified, but his testimony could not cover the negotiations Davis had with the appellants, or the delivery and the unloading of the truck, or the payment of the $7,000 by Perlie Workman to Davis for delivery to Wilson. As we stated in United States v. Welsh, 774 F2d 670, 672

(4th Cir. 1985):

> For evidence to be admissible under 804(b)(5), it must be more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts. Fed. R. Evid. 804(b)(5)(B). The probative value of evidence is its 'tendency...to establish the proposition that it is offered to prove.' McCormick on Evidence, 3rd Ed., 185, at 541. Evidence has probative value if it tends to prove the issue in dispute. United States v. Ball, 547 F. Supp. 929 (E.D. Tenn. 1981).

The statement of Davis was "more probative" because it was the only evidence available to prove many of the essential elements of the crimes charged.

The admission of the Davis statement was also in keeping with the general purposes of the evidence rules, and the interests of justice were best served by its admission. Without this statement the government could not have proved its case. The death of a most material

witness should not abort a prosecution when a statement by the deceased witness may be admitted under a firmly rooted exception to the hearsay rule. The Rules of Evidence clearly express a preference for live testimony given in person from the witness stand, but hearsay, if of a specific quality, is better than a complete loss of the evidence of the declarant. The Davis statement is of the quality specified and was properly admitted.

III

We find no merit to the appellants contention that the evidence was insufficient to prove their guilt beyond a reasonable doubt. The primary evidence against the appellants was the Davis statement, but it was corroborated and enforced by the various telephone records showing six telephone calls from the

Davis residence to the appellants' residence during the twenty-four hours following the initial call from Wilson to Davis asking for help in selling the liquor, and the telephone calls from the appellants' residence to Norman in South Carolina, and the finding of a large quantity of the whiskey on Norman's farm. There was also the testimony of Wilson that he saw his truck parked across the road from appellants' house. The evidence of Perlie Workman's threats and intimidation of Davis and his delivery of $3,000 to Davis' father could also be considered by the jury in deciding that Perlie Workman was guilty. There was ample evidence to support the aiding and abetting conviction of Jeffrey Workman.

IV

The evidence was sufficient to convict Perlie Workman of threatening a

witness in violation of 18 U.S.C. 1512(b)(1), which provides:

> Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to (1) influence, delay, or prevent the testimony of any person in an official proceeding shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

Perlie Workman's statement that he was going "to show you what you gonna get", which was made after Davis had informed him that Jeffrey Workman was probably going to be indicted and that Davis would have to testify truthfully, constituted a threat within the meaning of the statute. In United States v. Capo, 791 F.2d 1054, 1070 (2d Cir. 1986), the Court stated:

> The evidence was ample to support the jury's verdict finding Capo guilty of having attempted to intimidate

> Gauthier in an effort to prevent his testifying in the grand jury proceeding. Capo's statements to Gauthier, made in response to Gauthier's informing Capo in February 1983 that he intended to testify before the grand jury, including Capo's gratuitous disclaimer that he was a member of the 'mob', and his dropping the name of the brother of a known organized crime figure in connection with his advice that if everyone kept silent there would be no problem. Capo's intention that his statements, including his references to organized crime, were too ambiguous to be construed as threats was an argument more properly addressed to the jury. The jury was free to reject it, as it apparently did.

In United States v. Greybear, 828 F.2d 1286, 1297 (8th Cir. 1987), a statement that the defendant "told us not to say anything, we'd get the same thing" was found to be a sufficient threat and intimidation of a witness under the witness intimidation statute. The statement of Perlie Workman to Davis that "you know what you're gonna get? I'm

gonna show you what you gonna get" was sufficient, when considered with all of the other circumstances surrounding the meeting of Davis and Perlie Workman, to establish an intimidation or threat to influence or prevent testimony in an official proceeding.

AFFIRMED.

June 18th

"Keith"

Whats up man. Remember when I was here last and what I told you about my case. Terry's tryin to put the blame on Perl Workman. You remember when I told you about this guy from S.C. and that Terry sold the load to him. Now he's been indicted and I think he will be in court also. Hell now Terry is pleading guilty for a plea bargin and Terry came to Rutherford a copy of times to try to get me to say that I knowed Workman. And that he bought the stuff. And he's saying that Workman bought it. But you and I know who bought the stuff. Hell I'm not going to lie just to help Terry's ass. I don't know whats up, but I do know that some guy in S.C. bought it. When are you getting out and have you been tried. Write back.

Ron

A28

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No. 88-1081

In the Supreme Court of the United States

OCTOBER TERM, 1988

PERLIE DONALD WORKMAN AND
JEFFREY WORKMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the hearsay statement of an unavailable witness was properly admitted under Fed. R. Evid. 804(b)(5) and the Confrontation Clause.

2. Whether the evidence was sufficient to sustain petitioner Perlie Workman's conviction for threatening a witness, in violation of 18 U.S.C. 1512(b)(1) (1982 & Supp. IV 1986).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 860 F.2d 140.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1988. The petition for a writ of certiorari was filed on December 27, 1988 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, each petitioner was convicted of receipt of stolen property in interstate

commerce, in violation of 18 U.S.C. 659. In addition, petitioner Perlie Workman was convicted of threatening a witness with intent to influence his testimony in an official proceeding, in violation of 18 U.S.C. 1512(b)(1) (1982 & Supp. IV 1986). Perlie Workman was sentenced to nine years' imprisonment and an $8,000 fine. Jeffrey Workman was sentenced to a suspended term of four years' imprisonment, five years' probation, and a $2,500 fine.

1. The evidence at trial showed that in July 1986, Ronald Wilson, a professional truck driver, received a shipment of 1,068 cases of liquor for delivery to a company in Texas. Wilson, who was in debt, decided to steal the shipment and sell it. He called his cousin, Terry Davis, and asked him to find a buyer for the liquor. Between July 25 and 26, six telephone calls were placed between Davis's residence and petitioners' residence. Pet. App. A2-A3.

Davis told Wilson to bring the shipment to a motel in Icard, North Carolina. Wilson then accompanied Davis to petitioners' home, where Davis told Jeffrey Workman that they had a shipment of liquor for sale. Jeffrey stated that he would contact them after Perlie Workman returned home. After Davis and Wilson made an unsuccessful attempt to sell the liquor elsewhere, Davis returned to petitioners' residence and offered the shipment to Perlie, who responded that he did not want the liquor but would contact someone who might be interested. Between July 26 and 27, three telephone calls were placed from petitioners' residence to numbers listed to James Norman in South Carolina. Pet. App. A3-A4.

On July 26, Jeffrey advised Davis that he and Perlie would buy the liquor for $7,000 and instructed Davis to come, without Wilson, to deliver the liquor. After telling Wilson about the offer and confirming the price with Perlie at Wilson's direction, Davis delivered the liquor to petitioners' residence and received $7,000 from Perlie.

Petitioners, Davis, and two other men unloaded the liquor from the truck and placed it in a nearby building. Davis then met Wilson at a convenience store and gave him the $7,000. Wilson paid Davis $500 for arranging the sale. Two months later, 422 cases of stolen liquor were found on James Norman's South Carolina farm. Pet. App. A4-A5.

In January 1987, a federal grand jury returned a three-count indictment against Perlie Workman, Davis, and Wilson for the theft and sale of the liquor. In April 1987, Perlie, without explanation, gave $3,000 in cash to Davis's father and asked that he give it to Davis. After checking with Davis, Davis's father returned the money to Perlie. At that time, Perlie told Davis's father that, although he knew he should not, he wanted to talk to Davis. Pet. App. A5-A6.

Thereafter, Davis agreed to plead guilty to one count of the indictment and to cooperate with the government. On May 12, 1987, Davis and his attorney met with an FBI agent. In a tape-recorded statement that implicated petitioners and Wilson, Davis confessed his role in the sale of the stolen liquor. Pet. App. A6-A7.

On June 10, 1987, Perlie asked Davis to meet with him. Davis contacted the FBI agent, who fitted him with a hidden tape recorder and transmitter, and then met with Perlie in Perlie's car outside a convenience store. Davis told Perlie that Jeffrey would probably be indicted. Davis said that he would have to tell the truth, and that he was scared. The following exchange took place:

> Perlie: "scared, hell, scared of what? You're in fact * * * you know what you are going to get? I'm gonna show you what you gonna get."
>
> Davis: (shouts) "no you don't Perl."

> Davis: (as he exited from Perlie's car): "Oh Lord! (pause) I've got to leave here."
>
> Perlie: "Terry, you better get here."

After Davis fled, the FBI agent arrested Perlie Workman. Pet. App. A8-A9.

Two weeks before trial, Davis died of hepatitis. The government then notified petitioners that it intended to introduce Davis's statement into evidence at trial. The district court admitted the statement, and a jury convicted petitioners. Petitioners challenged their convictions, contending that the district court's admission into evidence of Davis's recorded statement violated their Sixth Amendment right to confrontation and was improper under Fed. R. Evid. 804(b)(5). Perlie Workman also asserted that there was insufficient evidence to convict him on the Section 1512(b)(1) charge.

2. The court of appeals affirmed. Pet. App. A1-A27. The court held (Pet. App. A15) that Davis's statement had been properly admitted under Fed. R. Evid. 804(b)(5) because it bore sufficient "circumstantial guarantees of trustworthiness" to ensure its reliability. First, Davis had given his statement voluntarily in the presence of his attorney and the attorney had insisted upon and made the recording. Pet. App. A14-A15. Second, Davis's subsequent agreement to meet Perlie while wearing a tape recorder supplied by the FBI "demonstrated his conviction that his statement was true, and that a recorded meeting with Perlie Workman would support, and not contradict, his statement." Pet. App. A16-A17. Third, Davis's statement qualified as a statement against interest by an unavailable declarant under Fed. R. Evid. 804(b)(3). Pet. App. A17-A18. Fourth, Davis's statement was corroborated by other evidence at trial, including the evidence of the phone calls from Davis's residence to petitioners' resi-

dence; the calls from petitioners' residence to Norman, and the subsequent discovery of a large quantity of stolen liquor at Norman's farm; trial testimony by Wilson that he had observed his truck parked across from petitioners' residence; and Perlie Workman's attempt to give Davis money and his subsequent threats against Davis. Pet. App. A23-A24. The court concluded (Pet. App. A14-A15) that the same circumstances that demonstrated the trustworthiness of Davis's statement for purposes of Fed. R. Evid. 804(b)(5) provided "adequate indicia of reliability" to ensure that the use of an out-of-court statement made by an unavailable declarant did not violate the petitioners' Sixth Amendment right to confront the witnesses against them.

The court also concluded that Perlie Workman's statement, "you know what you're gonna get? I'm gonna show you what you gonna get," when considered in light of the surrounding circumstances, was sufficient to sustain Perlie Workman's conviction for threatening Davis. Pet. App. A24-A27.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the court of appeals erred in upholding the admission of Davis's statement into evidence under Fed. R. Evid. 804(b)(5) and the Confrontation Clause. The court of appeals correctly determined on the facts of this case that the requirements of both Fed. R. Evid. 804(b)(5) and the Confrontation Clause were met. That ruling is correct and does not warrant further review.

Rule 804(b)(5) authorizes the admission of an unavailable witness's hearsay statement not covered by a specific hearsay exception if the statement has "equivalent circum-

stantial guarantees of trustworthiness."[1] The Confrontation Clause similarly requires that hearsay evidence of an unavailable witness bear "adequate 'indicia of reliability' " to assure that it does not offend a defendant's right to confront and cross-examine the witnesses against him. *Ohio* v. *Roberts,* 448 U.S. 56, 66 (1980). For purposes of the Confrontation Clause, such reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ibid.*[2] Where, as here, the evidence does not fall within a firmly rooted hearsay exception, and is thus "presumptively unreliable," it may nonetheless meet Confrontation Clause reliability standards "if it is supported by a 'showing of particularized guarantees of trustworthiness.' " *Lee* v. *Illinois,* 476 U.S. 530, 543 (1986) (quoting *Roberts,* 448 U.S. at 66). Evidence found admissible after such a showing may include the confes-

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[1] Petitioners do not dispute that the evidence at issue in this case met the other requirements for admission under Fed. R. Evid. 804(b)(5). Those requirements, which the court of appeals found satisfied (Pet. App. A10, A19-A23), are that:

> * * * (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[2] Contrary to petitioners' contentions (Pet. 22-24), the court of appeals cited *Bourjaily* v. *United States,* 483 U.S. 171 (1987), for no more than this proposition. See Pet. App. A14. The court recognized (*ibid.*) that the principle did not apply here, where the statement was admitted into evidence under Fed. R. Evid. 804(b)(5).

sion of an unavailable co-defendant. *Lee* v. *Illinois*, 476 U.S. at 545.[3]

The court of appeals reviewed the record and determined that the district court did not err by admitting Davis's statement, because a number of circumstances lent Davis's statement "a high degree of reliability and trustworthiness." Pet. App. A19 (quoting *United States* v. *West*, 574 F.2d 1131 (4th Cir. 1978)). The court of appeals concluded that those "guarantees of trustworthiness" were sufficient to satisfy the requirements of both Fed. R. Evid. 804(b)(5) and the Confrontation Clause. See, *e.g.*, *United States* v. *Woolbright*, 831 F.2d 1390, 1396-1397 (8th Cir. 1987) (indicia of reliability satisfying Fed. R. Evid. 804(b)(5) also satisfied Confrontation Clause requirements); *United States* v. *Barlow*, 693 U.S. 954, 964-965 (6th Cir. 1982) (same), cert. denied, 461 U.S. 945 (1983); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 800[04], at 800-35 (1988) (compliance with Article VIII of Federal Rules of Evidence should constitute compliance with Confrontation Clause requirements). That conclusion is well supported by the record.[4]

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[3] Although the Court in *Lee* v. *Illinois* held that the admission of the accomplice's out-of-court statement in the circumstances of that case violated the Confrontation Clause, the Court recognized that such statements would not be barred if they bore sufficient guarantees of trustworthiness. See also *New Mexico* v. *Earnest*, 477 U.S. 648, 649-650 (1986) (Rehnquist, J., concurring).

[4] Contrary to petitioners' contention (Pet. 20), the court of appeals correctly determined that *Bruton* v. *United States*, 391 U.S. 123 (1968), is not relevant to this case. *Bruton* concerned the admission into evidence of a non-testifying co-defendant's confession at a joint trial where the confession was not admissible against the defendant under any exception to the hearsay rule. The issue in *Bruton* was whether a limiting instruction directing the jury not to consider the confession against the defendant was sufficient to prevent any prejudice to the defendant from the admission of the statement, which

First, Davis gave his statement voluntarily, in the presence of his attorney. There was no doubt about the identity of the voices on the tape-recording of the statement, and both the agent who took the statement and Davis's attorney testified concerning the circumstances under which it was made. Pet. App. A15-A16.

Second, after giving the statement, Davis agreed to wear a tape recorder while meeting with Perlie, which "demonstrated his conviction that his statement was true, and that a recorded meeting with Perlie Workman would support, and not contradict, his statement." Pet. App. 16-17. See *United States* v. *West,* 574 F.2d 1131, 1135 (4th Cir. 1978) (declarant's willingness to obtain recorded statements from defendants showed that his statements were reliable).

Davis's statement was also corroborated by evidence at trial. Perlie's attempt to bribe Davis before Davis ever contacted the FBI to give his statement constituted an implied admission of guilt by Perlie as well as his knowledge that Davis was in a position to implicate Perlie. Pet. App. A24. At trial, Wilson's testimony about the crime was entirely consistent with Davis's statement. Wilson's testimony corroborated Davis's statement in general, and it directly implicated petitioners, because Wilson testified that after Davis made a telephone call from the motel, Davis drove Wilson's truck to a location across the street from petitioners' home. Three or four hours later, according to Wilson's testimony, Davis returned the truck to Wilson

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was otherwise highly inculpatory. In *Bruton*, it was undisputed that the co-defendant's confession was inadmissible against the defendant; the only issue before the Court was whether the instruction to the jury was sufficient to protect the defendant from the risk that the jury would make improper use of the confession. In this case, by contrast, the issue is whether the statement in question was fully admissible under the hearsay rules and the Confrontation Clause so that it could be admitted into evidence without any limitations on its use against any of the defendants. See *Lee* v. *Illinois*, 476 U.S. at 542.

and gave Wilson $6,000 in cash. C.A. App. 86-97. Finally, the telephone company records introduced into evidence showed that between July 25 and 27, six telephone calls were placed between Davis's residence and petitioners' residence, and three calls were placed from petitioners' residence to Norman. All of that evidence, taken together,[5] demonstrated that Davis's statement had the "particularized guarantees of trustworthiness" that the Confrontation Clause requires, and the "circumstantial guarantees of trustworthiness" equivalent to those characterizing the specific exceptions to the hearsay rules that Fed. R. Evid. 804(b)(5) requires.[6]

2. Perlie Workman contends (Pet. 29-35) that the evidence was insufficent to sustain his conviction for threatening a witness, in violation of 18 U.S.C. 1512(b)(1) (1982 & Supp. IV 1986). He maintains that his remarks to Davis

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[5] Petitioners contend (Pet. 20) that Davis's statement was unreliable because Wilson stated in a letter he wrote while he was in prison that Davis was lying when he stated that petitioners "bought the stuff," because "some guy in S.C. bought it." Pet. App. A28. Wilson's letter is not entitled to weight because Wilson was not present at the sale made by Davis. In any event, the letter does not contradict Davis's statement because Davis stated merely that Perlie sought to buy the liquor for a third party; he did not suggest that petitioners sought to buy the liquor for themselves. In fact, by confirming that "some guy in S.C." brought the liquor, Wilson's letter supported the government's theory that the liquor was ultimately sold to Norman.

[6] Petitioners incorrectly contend (Pet. 24-25) that the court of appeals erred by admitting Davis's statement under the hearsay exception for statements against interest by unavailable declarants, Fed. R. Evid. 804(b)(3). The court of appeals did observe (Pet. App. A16) that Davis's statement was against his penal interest, but the court did not separately uphold the admission of the statement under Rule 804(b)(3). This case therefore does not present the question whether Davis's statement would have been admissible under Rule 804(b)(3) even though it was made to law enforcement officers after Davis's arrest.

were ambiguous and did not constitute a threat. This fact-bound issue merits no further review.

Perlie's statement that he was going to "show [Davis] what [he was] gonna get," after Davis had informed him that petitioners were about to be indicted and that Davis would have to testify truthfully against them, was sufficiently intimidating to constitute a threat within the meaning of Section 1512(b)(1). See *United States* v. *Grey Bear*, 828 F.2d 1286, 1297 (8th Cir. 1987) (remark that witness would "get the same thing" as beaten victim if he spoke up supported conviction for witness tampering); *United States* v. *Capo*, 791 F.2d 1054, 1069-1070 (2d Cir. 1986) (advice that there would be no problem if everyone kept silent, together with references to membership in the "mob" and the name of a brother of a well-known crime figure were sufficient to constitute a threat).[7]

Furthermore, Davis's frightened reaction to Perlie's remarks and his sudden and hurried exit from the car demonstrated that Perlie's remarks had been intimidating.

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[7] Relying on *Massiah* v. *United States*, 377 U.S. 201 (1964), Perlie contends (Pet. 33-34) that his Sixth Amendment right to counsel was violated when the police obtained his recorded statement to "get" Davis while he was under indictment on charges relating to the theft and sale of liquor shipment. There is no merit to this claim. In the first place, Perlie has waived this claim because he did not raise the issue at trial. Second, *Massiah* does not apply to statements that relate to crimes for which the right to counsel has not attached. See *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458 n.21 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 180 n.16 (1985). Perlie had no right to counsel on the charge of witness tampering at the time he uttered his threat, because he was not yet charged with that crime; indeed, Perlie did not even commit the crime of witness tampering until the encounter in which Perlie claims he should have been afforded the assistance of counsel. Thus, there was no violation of his right to counsel on the witness tampering charge.

See *United States* v. *Wilson*, 796 F.2d 55, 58 (4th Cir. 1986) (witness's adverse reaction to defendant's remarks showed that the defendant intended to harass the witness), cert. denied, 479 U.S. 1039 (1987).

Finally, the circumstances leading up to the meeting between Perlie and Davis strongly indicate that Perlie was attempting to induce Davis not to reveal Perlie's role in the crime. Shortly after Perlie, Davis, and Wilson were indicted, Perlie tried to give $3,000 to Davis without explanation. Perlie subsequently told Davis's father that he wanted to meet with Davis, although he knew he should not do so. Two months later, Perlie asked Davis to meet with him. It was at that meeting, when Davis said that he would have to tell the truth, that Perlie made the comments that were alleged to constitute a threat to Davis. In light of Perlie's course of conduct leading up to the meeting and at the meeting itself, the jury could properly conclude that Perlie intended his comments to be taken as a threat and that he was trying to influence Davis's testimony in the proceedings against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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